No. 11641

United States
Circuit Court of Appeals
For the Ninth Circuit

B. M. PHELPS and ALICE E. PHELPS,
Appellants,

vs.

FLOYD HANSON, EZRA HANSON, SARA HANSON and EVA M. HAMMOND,
Appellees.

Brief for Appellees

Upon Appeal from the District Court of the United States for the District of Montana.

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415 Electric Building,
Billings, Montana,

ROCKWOOD BROWN,

HORACE S. DAVIS,

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....., Clerk

BILLINGS GAZETTE, BILLINGS, MONTANA

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TABLE OF TEXTS, STATUTES, TREATIES, ETC. CITED (Continued)

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BRIEF FOR APPELLEES

I.

ABSTRACT OF THE CASE

To supplement the statement of the case made in the appellants' brief *(App. Br., pp. 3-7)* counsel for the appellees note these further facts in the record at bar:

The only allegation in the amended complaint of the value of the matter in controversy between the litigants is found in paragraph I in these words *(R. 2)*:

> ". . . That the value of the matter in controversy exceeds, *exclusive of costs,* the sum of Three Thousand Dollars ($3,000)." (Italics supplied.)

Paragraphs II, III and IV *(R. 22-24)* of the appellees' motions to dismiss, etc. *(R. 22-27)* were sustained by the district court *(R. 29-37)*. These paragraphs appear in the appellants' brief in part only. *(App. Br., pp. 5-6)* Accordingly, we set out here in full these paragraphs of the motion to dismiss as follows *(R. 22-24)*:

"II.

To dismiss the plaintiffs' amended complaint and action for the reason that it appears from the face of the amended complaint the court has no jurisdiction over the subject matter of the action.

"III.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not arise under (a) the Constitution of the United States, or (b) the laws of the United States, or (c) a treaty made under their authority.

"IV.

To dismiss the plaintiffs' amended complaint and action for the reason that the court is without jurisdiction, because the matter in controversy does not exceed $3,000.00, exclusive of interest and costs, as an inspection of the allegations of the amended complaint shows, and more particularly as appears otherwise in that

(a) The plaintiffs cannot recover herein any amount in excess of $3,000.00, exclusive of interest and costs, nor any other amount at all; and

(b) The value of the right to the use of the waters, during the annual irrigation seasons, of the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference by the defendants, which is the matter in controversy herein, does not exceed the sum of $3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than $50.00, or thereabouts; and

(c) The value of the plaintiffs' right to the use, during the months of May, June, July, August and September of each year, of the water in the south fork of Dry Head Creek, delivered upon the plaintiffs' lands and into their ditch or ditches, without interference, diversion or prior use by the defendants, which as the plaintiffs allege does not equal 60 miner's inches of water, and which is the

matter in controversy herein, does not exceed the sum of $3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than $500.00, or thereabouts; and

(d) The value of the plaintiffs' right to the use of the waters in the south fork of Dry Head Creek during the annual irrigation seasons, as claimed by them in their complaint, without interference by the defendants, is because of the nature of the flow of the south fork aforesaid, of the creek bed, and of other attendant physical factors in nowise lessened or diminished by the use of the plaintiffs and their diversion of the waters in the south fork aforesaid as heretofore has long been customary and usual. Accordingly the matter in controversy is of inconsequential value, does not exceed the sum of $3,000.-00, exclusive of interest and costs, and is to the contrary of a value not greater than $500.00, or thereabouts; and

(e) The use and the diversion by the defendants of the waters of the south fork of Dry Head Creek, as has heretofore been usual and customary during the annual irrigation seasons, and as is alleged in the plaintiffs' amended complaint, does not appreciably diminish any right of the plaintiffs to the use of the flow of water in the south fork of Dry Head Creek at any time during the annual irrigation seasons aforesaid or otherwise. Accordingly, the diminution in value of the plaintiffs' rights as they claim because of any use or prior diversion by the plaintiffs does not exceed the sum of $3,000.00, exclusive of interest and costs, and is to the contrary not more than $500.00, or thereabouts, and

(f) The plaintiffs have not heretofore lost, and will not hereafter lose, any sum, whatsoever, or be prejudiced in any sum of money or amount at all because of the use or diversion of any waters of the south fork of Dry Head Creek by the defendants at any time."

These and the other motions presented by the appellees were heard in open court on October 28, 1946. *(R. 28-29)* The rec-

ord of the proceedings had at that time upon the submission of these motions, as are the court minutes, is as follows *(R. 28-29)*:

"(Title of District Court and Cause.)

ORDER ALLOWING TIME TO FILE SUPPLEMENTAL BRIEF

"This cause was duly called for hearing this day on the consolidated motions to dismiss the amended complaint, said motions having been filed on May 30, 1946, Mr. Kenneth R. L. Simmons being present and appearing for the plaintiffs, and Mr. Horace S. Davis being present and appearing for the defendants.

"Thereupon Court ordered said motions submitted on plaintiffs' brief heretofore filed, counsel for plaintiff stating that the legal questions in the motions are covered in said brief, and further ordered that defendants be and are granted ten days to file a supplemental brief if so advised, the said defendants having heretofore filed a brief, but which brief may not cover the questions raised in the new motions, the said above-mentioned briefs having been filed on the consolidated motions directed to the original complaint herein.

"Entered in open Court at Billings, Montana, October 28, 1946.

H. H. WALKER, Clerk."

At the hearing the appellants offered no evidence to sustain the jurisdictional statement made in their amended complaint which the appellees' motion to dismiss directly challenged. Specifically beyond the naked allegations of that complaint itself the appellants offered nothing to show *(a)* that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00, which the appellees' motion directly denied *(Par. IV; R. 22-24)*; or *(b)* that the matter in controversy

arises under the Constitution or the laws of the United States, or treaties made, or which shall be made, under their authority, etc., which is also denied *(Pars. II and III; R. 22)*.

In short, upon the submission of these motions the appellants offered nothing to establish the facts upon which the jurisdiction of the lower court depended; a jurisdiction in law and fact with which the appellees took direct issue.

II.

POINTS OF LAW

The appellees contend on this appeal:

A. No matter in controversy arising under the Crow Treaty of May 7, 1868, is stated in the amended complaint or made to appear otherwise in the record herein.

B. The matter in controversy is not shown to exceed, exclusive of interest and costs, the sum or value of $3,000.

III.

SUMMARY OF APPELLEES' ARGUMENT

The argument made by the appellees to sustain the order of dismissal below is to be summarized as follows:

First, no matter in controversy between the parties within *Section 41(1)(a), Title 28, U. S. Code,* otherwise *Section 24 (1)(a),* as amended, *Judicial Code,* is alleged in the amended complaint to give the federal district court below jurisdiction of the cause. The appellants as the plaintiffs in the case by inference deraign their title to the controverted water rights from the United States, which in its turn has reserved to itself as trustee for the Crow Indians under the treaty of May 7, 1868, these

and other waters on the Crow Reservation.

But no controversy or dispute involving either these facts or this construction of the Crow Treaty or the effect of that treaty as alleged is set out. Indeed, the only issue between the parties which the amended complaint suggests is whether the appellees as the defendants in the cause have trespassed upon the rights which the appellants claim.

Neither in this nor in any other matter upon which the amended complaint touches is there tendered any issue involving the construction, the effect or the application of the Crow Treaty of May 7, 1868, upon which the appellants have contended federal jurisdiction is founded Accordingly, the appellees contend, there is no federal jurisdiction of the cause, because no controversy is alleged involving either the construction, the application or the effect of this treaty.

In other words, the amended complaint alleges only a reservation to the United States as trustee for the Crow tribe of the lands and waters within the Crow Reservation, an allegation which is in nowise disputed consistent with the decided cases. The appellants take any title which they may have to the water rights described by derivation only from the United States. None of the appellants takes directy or immediately under or by virtue of the Crow Treaty.

Accordingly, the appellants are no differently circumstanced than any landowner in the Western states particularly, who holds a title deraigned by patent from the United States which in its turn has acquired its title by treaty with France, Mexico, the

various Indian tribes which formerly were sovereign, etc. In these latter cases jurisdiction is not given the federal courts merely because a treaty made by the United States originates the title ultimately vesting in the landowner. Nor for like reasons is there federal jurisdiction at bar.

Second, neither the amended complaint nor the record otherwise shows the matter in controversy to exceed, exclusive of interest and costs, the sum or value of $3,000. The amended complaint alleges only that the value of the matter in controversy exceeds, "exclusive of costs," the sum of $3,000. *(R. 2)*

The appellees' motion to dismiss *(R. 22-27)* appropriately joins issue by denial upon this jurisdictional statement; particularly, in paragraph IV, subparagraphs (a), (b), (c), (d), (e) and (f) *(R. 22-24)*, is there denial that the value of this right involved meets the jurisdictional requirement. At the hearing upon this motion on October 28, 1946, the appellants did not, however, sustain their allegation of the amount involved or carry the burden cast thereby upon them. To resolve the issue joined by the appellees' motion that the controversy did not involve the jurisdictional amount of $3,000 the appellants made no showing at all when the motion to dismiss was regularly heard and submitted. *(R. 28-29)*

Accordingly, the trial court had no other alternative than to dismiss for want of jurisdiction within the rule of

KVOS, Inc. v. Associated Press,
299 U S. 269, 81 L.ed. 183,
57 Sup. Ct. Rep. 197; and

McNutt v. General Motors etc. Corp.,
298 U. S. 178, 80 L.ed. 1135,
56 Sup. Ct. Rep. 780.

The order of dismissal from which the appeal here is taken is then right because there is neither statement nor showing in the record of a matter in controversy arising under the Crow Treaty of May 7, 1868, nor of a value at stake which exceeds $3,000, exclusive of interest and costs.

IV.

ARGUMENT

The appellants' Specifications of Error Nos. I and II *(App. Br., p. 7),* **that the trial court erred in dismissing the amended complaint of plaintiffs and their cause of action and in not overruling the defendants' consolidated motions to dismiss amended complaint, for more definite statement, etc., filed in said action.**

Foreword

Counsel at bar agree that the jurisdiction of the United States district court here depends upon *Title 28, U. S. Code, Section 41 (1)(a),* otherwise *Section 24(1)(a), Judicial Code,* as amended. Thus the issue presented for determination upon this appeal is narrowed.

Diversity of citizenship is not relied upon, nor can it be. *(R. 3; Comp., par II).*

Accordingly, in our turn we quote the relevant language of the statute as the premise of the argument to follow. In point upon this appeal this statute reads:

Section 41. (Judicial Code, section 24 amended.) Orig-

inal jurisdiction. The district courts shall have original jurisdiction as follows:

(1) . . .: *civil suits at common law or in equity.* First. Of all suits of a civil nature, at common law or in equity, . . .; . . ., where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority . . ."

Compliance with these provisions in bringing the cause at bar is asserted by counsel for the appellants, denied by the appellees and their counsel.

A.

No matter in controversy arising under the Crow Treaty of May 7, 1868, is stated in the amended complaint or made to appear otherwise in the record here.

The argument here opposes that of the appellants' counsel presented first in their brief. *(cf. App. Br., pp. 7-14.)*

Nowhere in the amended complaint or in the record of the case made below, which the trial court ruled, is there stated any controversy involving any provision of the *Crow Treaty of May 7, 1868,* upon which the appellants allege their title depends. In the amended complaint there is a recital of the history of this treaty, the averment that the appellants' rights are rooted therein.

But no controversy involving any paragraph, sentence or clause of that treaty is set out.

Of the amended complaint paragraph I is merely the bald statement that the jurisdiction of the United States district court below "attaches by virtue of the fact that the rights of

plaintiffs claimed herein arise under" the treaty in question, and that the value of the matter in controversy "exceeds, exclusive of costs, the sum" of $3,000 *(R. 2)*.

Paragraph V of the amended complaint summarizes the effect of this treaty in reserving for the Crow Indians their reservation lands, which are then particularly described *(R. 4-6)*.

Paragraph VI locates the lands of the plaintiffs within the "boundaries of the Crow Indian Reservation as established by the Treaty of May 7, 1868," etc. *(R. 6)*.

In paragraph VII the intent and "purpose of the United States of America in entering into the above-mentioned treaties" is alleged *(R. 6-7)*.

In paragraph VIII there is the statement that "by the establishment of the Crow Indian Reservation, on May 7, 1868, the United States became the trustee of the Crow Tribe of Indians, holding legal title to all of the lands and waters of the Crow Indian Reservation and at that time, on May 7, 1868, there was then reserved to said Indians and their successors in interest for irrigation and other beneficial uses upon the lands of said reservation, and exempted from appropriation under territorial or state laws or otherwise, all of the waters of reservation streams necessary for the successful irrigation of irrigable lands upon said reservation," etc. *(R. 7)*.

But in all these recitals there is no note or hint of any controversy concerning either the Crow Treaty or its construction or the content of the rights which the appellants may have thereunder. And it is of the "matter in controversy," of which

Section 41(1)(a), supra, speaks, and which here to give the courts of the United States jurisdiction must be stated in the complaint as a controversy arising under the Crow Treaty of May 7, 1868, and not otherwise.

The legal effect of this treaty in reserving to the Indians the use of the waters on their reservation is not debatable, and under the decisions of this Court and of the Supreme Court of the United States cannot be controverted. See

> *Winters v. United States, 207 U. S. 564, 52 L. ed. 340, 28 Sup. Ct. Rep. 207;*
>
> *United States v. Powers, (C.C.A., 9th Cir.) 94 Fed. (2d) 783;*
>
> *United States v. McIntire, (C.C.A., 9th Cir.) 101 Fed. (2d) 650.*

Shortly stated the appellants in their amended complaint have merely asserted title to a waterright which derives, they say, from the Crow Treaty of May 7, 1868; they have stated there no controversy at all arising under that treaty. They allege at the most the ownership of waterrights which originate with the United States because of the implied reservation in trust to it under the Crow Treaty of May 7, 1868. But this is not enough.

Otherwise the present owner of every tract of land patented out by the United States, but which at one time lay within the boundaries of an Indian reservation, would be entitled to come into the federal courts because of a title originally stemming from a treaty made by the United States with an Indian tribe. Substantially all the lands in the territorial United States which lie beyond the borders of the thirteen original colonies have come

to their present owners by titles originating in treaties made with the Indians, with France, with Spain, with Mexico, etc.

In every such case the titles to these lands find their sources in a treaty made under the Constitution and the laws of the United States. These titles are vitalized by the laws of the United States, for they come by patent executed by the United States pursuant to its laws which convey out its ownership. Compare, for example, the original *Homestead Act of May 20, 1862, chap. 75, 12 Stat. 392,* and the subsequent amendments thereto.

But merely to recite the facts of such a title does not state a matter in controversy under *Section 41 (1)(a), supra,* and does not found federal jurisdiction. Such is the essence of the holding of the trial court below in this litigation *(R. 31, 33-35).*

(a) The appellees' authorities

Such are the decisions in point to which we now turn to sustain that holding.

In *Deere v. St. Lawrence Co., (C. C. A., 2nd Cir.) 32 Fed. (2d) 550,* noted in the decision of the court below *(R. 34-35),* there was presented a suit in ejectment by a plaintiff who claimed directly under two treaties made by the United States with Indian tribes. That is, as at bar, the plaintiff there as do the appellants here asserted a derivative right to the real property in issue under treaties made by the United States. The claim may best be phrased by an apt quotation from the opinion written in the Court of Appeals for the Second Circuit.

It is there said of the facts *(32 Fed. (2d) 550-551):*

"Appellant sues as a member of the St. Regis Tribe of

> Indians, on his own behalf and of other members of the tribe. The bill alleges that the tribe was out of possession for over 100 years. We may take notice that the location of the St. Regis Indian Reservation is in Franklin county, New York, adjacent to the St. Lawrence river. It is supported by the state of New York, and does not embrace the locus in quo, which is St. Lawrence county on the Grasse river. This tract has been privately owned for over 100 years. The bill alleges that the St. Regis Tribe is a band of the Mohawk Nation, which Mohawk Nation is a constituent nation of the Six Nations of the Iroquois Confederacy; that by the treaty of Ft. Stanwix, made in 1784 (7 Stat. 15), the Six Nations were secured in peaceful possession of the lands they inhabited, including the locus in quo; by the treaty between the United States and the Seven Nations of Canada and the state of New York, made in 1796 (7 Stat. 55), this particular tract in question was reserved to the use of the St. Regis Tribe of Indians; that the appellant is a member of the St. Regis Tribe, and that the lands so reserved are set apart as a federal reservation for said tribe, and no part of the reservation, as originally created, has been disposed of by the United States, nor with its consent, and that the appellees are in wrongful possession, withholding the same from the appellant."

Then after noting that diversity of citizenship was not relied upon to sustain federal jurisdiction, the court has this to say of the law directly in point upon the appeal at bar *(32 Fed. (2d) 551-552)*:

> " . . . it is asserted by appellant that his right is founded upon the treaties of 1784 and 1796, which gave him a present right of possession. This claim denotes that the source of appellant's title is in the treaties of the United States, and such an allegation does not establish the claim that the suit arises under the laws of the United States, so as to confer original jurisdiction. In Blackburn v. Portland, 175 U. S. 751, 20 S. Ct. 222, 44 L.ed. 276, it was held, where a controversy arose in respect to lands, and where

one of the parties derived title upon an Act of Congress, that of itself did not present a federal question. In Florida Cent. R. R. v. Bell, 176 U. S. 321, 20 S. Ct. 399, 44 L.Ed. 486, which was an action for ejectment, the plaintiff's claim was under the patent granted by the United States and in proceedings in the Land Department; the defendants contended that the plaintiffs were not entitled to a patent under the laws of the United States, and the defendant claimed the right under an Act of Congress to erect its railroad upon the patented land. Jurisdiction was denied by the court in holding that mere assertion of title to land derived to the plaintiffs under and by virtue of a patent granted by the United States presented no question which of itself conferred jurisdiction under the Circuit Court of the United States. . . ."

Again in this opinion it is said *(32 Fed. (2d) 552):*

". . . The treaties of 1784 and 1796 do not constitute a grant in praesenti to the plaintiff. Whatever right he had was a derivative right, and to succeed he must establish that he is entitled to the same right as his ancestors. . . ."

In this latter connection we note in passing the counsel for the appellants make no claim in their argument that by the treaty of May 7, 1868, any right to the use of the disputed waters in issue was reserved directly to the appellants, or conversely that any right of the United States reserved to it under this treaty is now adversed. Precisely as in the *Deere* case any right which the appellants may have is derivative and neither direct nor immediate. *(cf. App. Br., pp. 17-19).*

The Supreme Court in *Hull v. Burr, 234 U. S. 712, 58 L.ed. 1557, 34 Sup. Ct. Rep. 892,* has tersely put the rule in these words *(58 L.ed. 1562):*

". . . The rule is firmly established that *a suit does not so arise unless it really and substantially involves a dispute or*

controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading; not that matters of law must be pleaded as such, but that the essential facts averred must show, not as a matter of mere inference or argument, but clearly and distinctly, that the suit arises under some Federal law. . . ." (Italics supplied.)

In *Blackburn v. Portland etc. Co., 175 U. S. 571, 44 L.ed. 276, 20 Sup Ct. Rep. 22,* the suit was pursuant to *Sections 2325* and *2326, Revised Statutes of the United States;* otherwise *Sections 29, 30, Title 30, U. S. Code,* to determine adverse claims to a mining location made under the applicable acts of Congress and founded thereon. In other words, the title to the Fair Play lode mining claim in dispute came directly from the United States through the laws of the United States enacted by the Congress. The suit owed its virtue and existence to the permission of federal statutes. Nevertheless, federal jurisdiction in the courts of the United States was denied by the Supreme Court in part in these words *(44 L.ed. 280):*

". . . If the parties to the controversy were citizens of different states, and if the matter in dispute exceeded the sum or value of $2,000, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed $2,000, then the party claimant could proceed in a state court.

"This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which

had derived his title directly under an act of Congress, for that reason alone presented a Federal question. . . ."

Upon this statement there follows in the opinion a detailed analysis of the prior decisions of the Court to the point that a title originating in the laws of the United States does not alone give jurisdiction to the courts of the United States. There is in the *Blackburn* case particular note with approval of *Little York etc. Co. v. Keyes, 96 U. S. 199, 24 L.ed. 656.*

There Keyes began his action in the state court of California to restrain the defendants from polluting the waters of the Bear River by the deposit therein of the tailings and debris from their mining operations. The defendant, Little York Gold Mining & Water Company, Limited, and others impleaded with it removed the case to the United States circuit court alleging, among other things, that *(24 L.ed. 657-658):*

"'. . . your petitioners claim the right to work, use and operate said mines, and, in so doing, to use the channels of Bear River and its tributaries as a place of deposit for their said tailings under the provisions of the Act of Congress of the United States, entitled "An Act Granting the Right of Way to Ditch and Canal Owners Over the Public Lands, and for Other Purposes," passed July 26th, 1866, and the Act amendatory thereof, passed July 9th, 1870, and the "Act to Promote the Development of the Mining Resources of the United States," passed May 10th, 1872, and other laws of the United States.

"That said action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States above mentioned, as well as the preemption laws of the United States. That the mines of your petitioners are of great value, to-wit: of an aggregate value of not less than ten millions of dollars; and that if

your petitioners are prevented from using the said channels of Bear River and its tributaries as outlets for their said tailings and water, their said mines will be thereby rendered wholly valueless."

The close parallel between these averments in the *Keyes* case and those of the amended complaint at bar, which are here for consideration, is obvious.

In denying jurisdiction upon the facts alleged the Supreme Court said *(24 L.ed. 658):*

> "It is well settled that in the courts of the United States the special facts necessary for jurisdiction must, in some form, appear in the record of every suit . . ."

Specifically then the opinion continues *(24 L.ed. 658):*

> "In this petition (for removal), *the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines* that can only be worked by the hydraulic process, which necessarily requires the use of the channels of the river and its tributaries in the manner complained of; and *they allege that they claim the right to this use under the provisions of certain specified Acts of Congress.* They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the preemption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes." (Interpolation and italics supplied.)

Finally the Court here concludes *(24 L.ed. 658-659):*

> "The statutes referred to contain many provisions; but the particular provision relied upon is nowhere indicated. A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise

> out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . .
>
> "Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, 'in legal and logical form,' such as is required in good pleading. 1 Chit. Pl. 213, that *the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. . . .*" (Italics supplied.)

Compare

> *Taylor v. Anderson, 234 U. S 74, 58 L.ed. 1218, 34 Sup. Ct. Rep. 724.*

Finally, in closing the argument for the appellees under this point that no matter in controversy arising under the Crow Treaty of May 7, 1868, is disclosed by the record at bar, that accordingly the order of dismissal below for want of jurisdiction is clearly right we come again to the stubborn fact that the premise of the appellants' contention, if accepted, would bring substantially every case involving a title to lands in the Western states within the jurisdiction of the United States courts. This premise this Court has already ruled unsound.

In *Gustason v. California Trust Co., (C.C.A., 9th Cir.) 73 Fed. (2d) 765),* the plaintiff alleged, among other things, that the premises in dispute were the "public domain of the United States of America," that they were encumbered with homestead entries filed in the Land Office of the United States, that the "basic title to said premises now does, and forever will, prevent

the existence of fee title to said premises in defendants, or any of them," etc.

In affirming a judgment of dismissal entered by the district court this Court said by way of quotation from its earlier opinion in *Wilson v. Robinson, (C.C.A., 9th Cir.) 16 Fed. (2d) 431,* what is again directly applicable at bar *(73 Fed. (2d) 767):*

> ". . . 'The only ground upon which the plaintiff seeks to predicate federal jurisdiction is that the case arises under the laws of the United States. It is familiar knowledge that, to bring a case within this branch of jurisdiction, it must affirmatively and distinctly appear from the averments of the pleading that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of" a federal law, "upon the determination of which the result depends." It has further been authoritatively stated that "this is especially so of a suit involving rights to land acquired under a law of the United States. *If it were not, every suit to establish title to land in the Central and Western states would so arise, as all titles in those states are traceable back to these laws.*"'" (Italics supplied.)

To support this conclusion there is the further citation in the *Gustason* decision from the Supreme Court of the United States of

Shulthis v. McDougal, 225 U. S. 561, 56 L. ed. 1205, 32 Sup. Ct. Rep. 704; Shoshone Mining Co. v. Rutter, 177 U. S. 505, 44 L.ed. 864, 20 Sup. Ct. Rep. 726.

At this date there is no reason apparent, we submit, to justify a departure from the rule of these authorities, unless the cases noted in the appellants' brief *(App. Br., pp. 7-14)* compel a restatement of the rule otherwise applicable.

(b) The appellants' authorities

That these citations by adversary counsel have no such force, and are themselves not in point at bar is abundantly clear upon a first reading.

In *Smith v. Kansas City Title & Trust Co., 255 U. S. 180, 65 L.ed. 577, 41 Sup. Ct. Rep. 243,* the "matter in controversy" bore no faint resemblance to the case framed by the appellants' amended complaint. In the *Smith* case a shareholder in the Kansas City Title & Trust Company by his bill in equity sought to enjoin his company, its officers, agents and employees from investing the funds of the company in farm loan bonds issued by Federal Land Banks or Joint Stock Land Banks under authority of the *Federal Farm Loan Act of July 17, 1916,* as amended. After noting the rules by which the jurisdiction of the federal court is measured in such a case, as counsel for the appellants here have quoted from this opinion in their brief *(App. Br., pp. 7-8),* there follows a statement by the Court itself of the actual matter in controversy arising under the laws of the United States which the bill in the *Smith* case fairly and directly presented.

We quote on our part from the *Smith* case *(65 L.ed. 586):*

> "The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional, and the bonds valid and desirable investments The objecting shareholder avers in the bill that the securities were

> issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue."

Such a decision upon its facts is in point at bar certainly to indicate the general principles of law involved. The very statement of the controversy in the *Smith* case, as the Supreme Court has summarized the bill there before the Court, is to exclude the amended complaint reviewed on this appeal from the jurisdiction of the federal courts altogether.

There the outcome of the litigation depended solely and entirely upon a determination whether the challenged federal statutes were constitutional; here no controversy turns at all upon the holding already settled law that if the appellants' rights derive from the Crow Treaty, they have priority as of date May 7, 1868. Indeed, by inadvertence the appellants' brief recognizes precisely as much.

For it is there written *(App. Br., pp. 10-11)*:

> "If our interpretation of the Crow Treaty of 1868 is correct, and this is the chief matter in controversy here, the defendants or appellees can have no defense as being prior in time to the rights of the plaintiffs. Their only defense could be abandonment by plaintiffs of their rights under the rule in the case of the *United States v. Hibner, 27 F. 2d. 909,* or that there was a surplus of water available at all times over the needs of plaintiffs."

By the express admission then of adversary counsel the determination by this Court that the appellants' rights depend upon the Crow Treaty will not determine this case at all, if the

appellees establish abandonment by the appellants of their rights, or a surplus of water available at all times beyond the needs of the appellants. Nor will any construction of the Crow Treaty avail as an answer to the claims of these litigants, if the appellees defend upon the ground that they have never taken any water coming to the appellants under their right, that the waters which pass the appellees' lands sink and never reach the appellants' fields.

In the language of the *Smith* case cited by adversary counsel themselves to sustain their appeal here it is written, as is the quotation above, that the controversy which gives federal jurisdiction must question the validity or effect of the federal statute at bar and must be determinative of the entire litigation before the court. The rule applicable where a treaty is in the case can be no different.

But such is not the case which the amended complaint presents. We comment again unwittingly the appellants' counsel have conceded as much.

Nor is there comfort for the appellants' position in the citation of

United States v. Powers, 305 U. S. 527, 83 L.ed. 330, 59 Sup. Ct. Rep. 344, or *Winters v. United States, 207 U. S. 564, 52 L.ed. 340, 28 Sup. Ct. Rep. 207. (App. Br., pp. 9-10)*

Neither the court below nor counsel for the appellees at bar dispute in any particular the rule of these decisions. Indeed, such dispute at this late date is impossible.

That is, because the rule of the *Powers* and *Winters* cases may

not be disputed there is in the amended complaint at bar no faint hint of a controversy under either the Constitution or laws of the United States, or the Crow Treaty of May 7, 1868. There is here no debatable ground, we note again. Accordingly, there is for the appellants' counsel no support in the citation of these cases.

We accept the rule of these authorities as a binding construction of the Crow Treaty itself. With that rule and with that construction we have on the part of the appellees no quarrel in this litigation. And none is forecast in the amended complaint.

Not only are the *Winters* and *Powers* cases settled law; there is also nothing in either of the opinions written in these cases to suggest jurisdiction of the dispute framed by the amended complaint here reviewed. In both the *Winters* and the *Powers* cases jurisdiction in the courts of the United States was given because the United States was itself the plaintiff. Jurisdiction under the statute followed for this reason. See *Section 41(1), Title 28, U. S. Code; Section 24,* as amended, *Judicial Code.*

At bar the appellants as plaintiffs assert a cause of action in their own right. They expressly disclaim any connection with the United States at this date, particularly that the United States is in anywise interested in the litigation, or properly a party thereto. *(App. Br., pp. 17-19)* Then neither *United States v. Powers* nor *Winters v. United States* is authority for the premise which the appellants postulate, viz., that jurisdiction is conferred in this case upon the courts of the United States, because a matter in controversy arising under the Crow Treaty

of May 7, 1868, exists between the parties. Jurisdiction in neither the *Winters* nor the *Powers* case was recognized or accepted because of any such controversy, but rather because the United States was itself the plaintiff.

We may then lay to one side as wholly pointless here both of these decisions, which adversary counsel have stressed so emphatically. For what these cases stand we accept them in their entirety. Neither suggests jurisdiction of the appellants' cause now at bar in the district court of the United States below. Accordingly, the citation of these decisions to sustain the contention presently made by the appellants' counsel is not apt.

There is citation of *United States v. McIntire, (C.C.A., 9th Cir.) 101 Fed. (2d) 650,* to spell out jurisdiction in this litigation. *(App. Br., pp. 11, 13).* The *McIntire* case did not consider *Section 41(1)(a)* under which adversary counsel here assert jurisdiction. The *McIntire* case considered no phase of the jurisdictional question here drawn in issue. Rather the *McIntire* case was brought against the United States upon the theory that the plaintiff and the United States were either tenants in common or joint tenants of the waterrights involved, and that accordingly jurisdiction was given by *Section 41(25), Title 28, U. S. Code,* otherwise *Section 24(25), Judicial Code,* as amended. *(cf. 101 Fed. (2d) 652, 653)* Even so, jurisdiction was denied the United States District Court for Montana.

In *McCauley v. Makah Indian Tribe, (C.C.A., 9th Cir.) 128 Fed. (2d) 867,* the Indians sued as a tribe to enjoin the direct and immediate violation by certain officers of the state of Wash-

ington of rights secured to them by their treaty with the United States concluded in 1859. The case there was as though at bar the Crow tribe had sued to enjoin rights secured directly to the Crow Indians by their treaty of May 7, 1868. In the *McCauley* case the rights asserted by the Indians were directly denied and immediately invaded by the defendants.

The amended complaint reviewed on this appeal states no such controversy. The rights secured to the Crow Indians by their treaty as are the holdings in the *Winters* and *Powers* cases are not denied and are not invaded by the appellees. The amended complaint makes no show of any such denial or invasion.

Rather the appellants as "citizens and residents of the State of Montana" *(R. 3)* claim a derivative right under the Crow Treaty of May 7, 1868, which as secured to the Indians by that treaty and as defined in the *Winters, Powers* and *McIntire* cases is not controverted. Certainly, as the opinion in the *McCauley* case puts it, the matter in controversy there presented between the Makah tribe and the officers of the state of Washington is within the jurisdiction of the federal courts under *Section 41(1) (a), Title 28, U. S. Code.* That is, present the requisite jurisdictional amount of $3,000.

Compare *Makah Indian Tribe v. McCauly, (D. C., Wash.) 39 Fed. Sup. 75, at 77.*

There is again in the rule of the *McCauley* case far cry from a holding which sustains the appellants' premise at bar. The *McCauley* decision is no authority that "citizens and residents of the State of Montana" may appeal to the jurisdiction of the

United States courts to hear a case which involves no controversy disputing the rights of the Crow tribe under their treaty, rights long settled and recognized by all parties.

Tulee v. Washington, 315 U. S. 681, 86 L.ed. 1115, 62 Sup. Ct. Rep. 862, originated in the state courts. The case went from the Supreme Court of the state of Washington to the Supreme Court of the United States on appeal under *Section 344 (a), Title 28, U. S. Code.* The jurisdiction of a federal district court under *Section 41(1)(a)* in any case was neither considered nor decided. Nor was this latter statute involved in any phase of the case.

Tulee, the defendant in the state court, was convicted under the state law of a state offense, because he caught salmon without a state license He defended by asserting his rights as an Indian under the treaty of 1859 between the United States and the Yakima tribe. The Washington court held the statute under which Tulee was convicted was not repugnant to the treaty. Thus was federal jurisdiction on appeal from the highest court of the state of Washington to the Supreme Court of the United States founded.

Again the citation by adversary counsel of the *Tulee* decision is a citation without point in our view upon this appeal. It may even be conceded that Tulee could have brought his action directly in a federal court sitting in the state of Washington to enjoin the invasion of the right directly given him under the Yakima treaty, had he sought this relief and had the jurisdictional amount of $3,000 been involved. Even so, juris-

diction of the appellants' cause at bar in the federal courts is not made out.

For with Tulee the right under the Yakima treaty directly set up by him was directly and immediately adversed and denied by the state officials. Again, such is not the case here presented. The appellants claim title to a waterright which by inference they allege has descended to them from the United States, which in its turn took by the reservations made in the Crow Treaty of May 7, 1868. To this point the construction and effect of the treaty is not in controversy, is not disputed. No such dispute or controversy involving the construction or effect of the treaty is stated in the amended complaint, as was the case with Tulee. The *Tulee* case is accordingly under any construction of its facts without force in support of the appellants' contention.

We submit in summary of the point here that the amended complaint states no controversy arising under the treaty of May 7, 1868, between the United States and the Crow Indians, that at most the amended complaint merely alleges a title derived by the appellants from the United States to waterrights which the United States acquired in trust under the treaty of May 7, 1868. But this is not enough. Accordingly, jurisdiction in the United States District Court for the District of Montana fails.

The rule below is right; the order of dismissal entered by the trial court should be affirmed.

B.

The matter in controversy is not shown to exceed, exclusive

of interest and costs, the sum or value of $3,000.

Jurisdiction in the federal courts of the cause asserted in the amended complaint at bar fails also for the further reason that there is no showing the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000. Yet such a showing affirmatively made is an indispensable element of federal jurisdiction.

Section 41(1)(a) is specific to this point. The requirement is that the matter in controversy must exceed, "exclusive of interest and costs," the stipulated sum or value.

The statute is not satisfied where the matter in controversy, "exclusive of costs," is more than $3,000. The command is that before federal jurisdiction can attach there must be excluded from the matter in controversy not only costs, but also interest.

The allegations of the amended complaint themselves fail to disclose the first essentials of federal jurisdiction.

The amended complaint alleges only *(R. 2):*

> ". . . That the value of the matter in controversy exceeds, *exclusive of costs,* the sum of Three Thousand Dollars ($3,000)." (Italics supplied.)

On its face and without denial by the appellees this recital is not sufficient to satisfy the minimum requirements of the Supreme Court in its definition of federal jurisdiction under *Section 41(1)(a)* as announced in

> *KVOS, Inc. v. Associated Press,*
> *299 U. S. 269, 81 L.ed. 183,*
> *57 Sup. Ct. Rep. 197;* and

McNutt v. General Motors etc. Corp.,
298 U. S. 178, 80 L. ed. 1135,
56 Sup. Ct. Rep. 780.

In the *Associated Press* case the bill at bar alleged *(81 L.ed. 184):*

> ". . . ; 'the damage to which complainant is being subjected . . . is in excess of the sum of Three Thousand ($3,000.00) Dollars, *exclusive of interest and costs,* and the amount involved herein and in controversy herein is in excess of said sum of Three Thousand ($3,000.00) Dollars, *exclusive of interest and costs.*' " (Italics supplied.)

It is of this allegation which the Supreme Court says in its opinion later on *(81 L.ed. 187):*

> ". . . Therefore the court would not have been bound to dismiss upon a motion based solely on alleged insufficient pleading of the amount in controversy; . . ."

In the *McNutt* case Mr. Chief Justice Hughes speaking for an unanimous Court, first notes the question for decision is *(80 L.ed. 1136):*

> ". . . whether the matter in controversy exceeds the sum or value of $3,000, exclusive of interest and costs, so as to give the District Court jurisdiction. Judicial Code, Sec. 24 (1), U. S. C. A. title 28, sec. 41(1). . . ."

Of the impact of this statute upon a case brought before a district court of the United States the opinion in the *McNutt* case says directly in point here *(80 L.ed. 1141):*

> ". . . The prerequisites to the exercise of jurisdiction are specifically defined and the plain import of the statute is that the District Court is vested with authority to inquire at any time whether these conditions have been met. They are conditions which must be met by the party who seeks the exercise of jurisdiction in his favor. He must allege in his pleading the facts essential to show jurisdiction. . . ."

We repeat, the bare essentials of federal jurisdiction are not alleged in the amended complaint. The allegation there that the matter in controversy exceeds the sum of $3,000, "exclusive of costs," is not the allegation of the facts which satisfy the statute. There shall also be excluded interest. We submit the appellants are out of court on the face of the amended complaint, and without more.

Even so, by their motion to dismiss the appellees have taken direct issue with the value of the matter in controversy as the amended complaint has assumed to state that value. By paragraph IV(a) of that motion *(R. 23)* the appellees deny that the appellants can recover in this action "any amount in excess of $3,000.00, exclusive of interest and costs, nor any other amount at all."

By paragraph IV(b) the appellees' motion asserts the "value of the right to the use of the waters," which the appellants claim, and "which is the matter in controversy herein, does not exceed the sum of $3,000.00, exclusive of interest and costs, but is to the contrary of a value not greater than $50.00, or thereabouts" *(R.23)*.

In like manner paragraphs IV(c), IV(d), IV(e) and IV(f), which follow *(R. 23-24)*, put directly in issue the appellants' claim of an amount or value in controversy sufficient to give the district court below jurisdiction of the litigation.

Yet in these circumstances, when the appellees' motion to dismiss was heard in the trial court on October 28, 1946, there was submission on the part of the appellants without evidence or

proof to sustain their claim of jurisdiction, or to support the allegation that the matter in controversy exceeded the sum of $3,000.00, "exclusive of costs," as their amended complaint reads *(R. 28-29; 2)*. Certainly the cause was properly dismissed by the lower court.

The motion to dismiss appropriately put in issue the court's jurisdiction to hear the cause at all, and upon the hearing called for proof by the appellants to sustain the jurisdiction which they asserted. Again, directly in point are the decisions in the Supreme Court of

KVOS, Inc. v. Associated Press,
299 U. S. 269, 81 L.ed. 183,
57 Sup. Ct. Rep. 197; and

McNutt v. General Motors etc. Corp.,
298 U. S 178, 80 L.ed. 1135,
56 Sup. Ct. Rep. 780.

In the *Associated Press* case it is said in point here *(81 L.ed. 188)*:

> ". . . But where the allegations as to the amount in controversy are challenged by the defendant in an appropriate manner, the plaintiff must support them by competent proof. The petitioner's motion was an appropriate method of challenging the jurisdictional allegations of the complaint. It did not operate merely as a demurrer, for it did not assume the truth of the bill's averments and assert that in spite of their truth the complaint failed to state a case within the court's jurisdiction. On the contrary the motion traversed the truth of the allegations as to amount in controversy and in support of the denial recited facts dehors the complaint. This could have been done by answer but the time for answer had not arrived when the rule to show cause was issued and petitioner was faced with the possibility of an injunction. The motion required the trial court to inquire as to

> its jurisdiction before considering the merits of the prayer for preliminary injunction. And in such inquiry complainant had the burden of proof . . ."

In the case at bar on October 28, 1946, the appellees' motions to dismiss were for hearing; the court proceeded then to inquire into its jurisdiction. Counsel for the appellants stated that "the legal questions in the motions are covered in said brief." Then without a showing of any kind to sustain their claim of jurisdiction the appellants rested this hearing *(R. 28-29)*.

Thus was the lower court brought face to face with the command of the Supreme Court in the *Associated Press* case to this effect *(81 L.ed. 189)*:

> "Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed. . . ."

Precisely such was the rule of dismissal from which this appeal is prosecuted.

The *McNutt* case is equally conclusive. There following upon the quotation already made above from the text of this opinion the Court said *(80 L.ed. 1141)*:

> ". . . If he does make them (allegations requisite to jurisdiction), an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exerted in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be

maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. And where they are not so challenged the courts may still insist that the jurisdictional facts be established or the case be dismissed, and for that purpose the court may demand that the party alleging jurisdiction justify his allegations by a preponderance of evidence. We think that only in this way may the practice of the District Courts be harmonized with the true intent of the statute which clothes them with adequate authority and imposes upon them a correlative duty."

The order of dismissal from which this appeal is taken conforms to this command. The appellants failed to carry the burden of proof which was with them below. Rightly they were then ruled out of court.

To the same point that this cause was rightly dismissed below for want of any sufficient showing that the jurisdictional amount required was in controversy we cite without specific comment the cases and texts following:

Electro Therapy etc. Corporation v. Strong, (C.C.A., 9th Cir.) 84 Fed. (2d) 766;

Subirana v. Kramer, (C.C.A., 1st Cir.) 17 Fed. (2d) 725;

Abbott v. Eastern Massachusetts etc. Co., (C.C.A., 1st Cir.) 19 Fed. (2d) 463;

Makah Indian Tribe v. McCauly, (D. C., Wash.) 39 Fed. Supp. 75 (suit by Indian tribe to enforce treaty rights requires jurisdictional amount of $3,000 as well as federal question), reversed on other grounds by

McCauley v. Makah Indian Tribe, (C.C.A., 9th Cir.) 128 Fed. (2d) 867);

Teeters v. Henton, (D. C., Wyo.) 43 Fed. (2d) 175, at *177* (trespasses on Indian reservation if presenting federal question must involve jurisdictional amount);

Zicos v. Dickmann, (C.C.A., 8th Cir.) 98 Fed. (2d) 347;

35 C.J.S. 833, sec. 28, and cases cited in *note 12;*

35 C.J.S. 840, sec. 29 (cases arising under treaties involve like jurisdictional requirements as to amount in controversy).

Compare also

Healy v. Ratta, 292 U. S. 263, 78 L.ed. 1248, 54 Sup. Ct. Rep. 700.

We submit that the second point of law made by the appellees is also sustained. Accordingly, for this further reason the order of dismissal entered by the trial court merits an affirmance.

V.

CONCLUSION

In the paragraphs above the appellees have made their argument to sustain the order from which this appeal is taken. They have there drawn their conclusions. More by way of summary of the appellees' contentions is not pertinent here.

But there is one paragraph in the appellants' brief *(App. Br., p. 14)* which yet calls for appropriate comment. Appropriately that comment is made to close this brief.

Because counsel for the appellees have not acquiesced without murmur in an effort to foist upon the district court below jurisdiction where in law no jurisdiction is given, they are accused of trying to "avoid trial and determination of any issue and settlement of whatever controversy may exist by way of the inter-

pretation of the Crow Treaty by the federal courts, out of which comes plaintiffs' right to the use of these waters." *(App. Br., p. 14)* As well charge the trial judge who sustained the appellees' motion to dismiss with complicity in the wrong done the appellants! All of which is of course sheer nonsense.

We suggest the appellants had this very case at issue in the state courts before this action was brought in the District Court of the United States for Montana. Rather than try out the issues there joined the case was dismissed. The cause is now here. There is complaint only because by their own deliberate choice counsel for the appellants have chosen to change the forum of the trial.

We submit they are as greviously in error in voicing their complaint because of the delay which has ensued as they are in framing the real issues of their cause.

Respectfully submitted,

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Attorneys for Appellees.

Personal service of the within and foregoing Brief for Appellees made and admitted, and the receipt of three copies thereof acknowledged, this ..... day of September, 1947.

SIMMONS & ALLAN,

By .....

Attorneys for Appellants.